A

PP

v.

MOHD HATTA MD RAMLI & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
AZMAN ABDULLAH JC
[CRIMINAL REVISION NO: 43-06-2009]
3 SEPTEMBER 2009

C ***CRIMINAL PROCEDURE:*** *Revision - Discharge not amounting to acquittal - Discharge ordered on the ground that charge did not indicate five persons or more for the offence of unlawful assembly - Whether order for such discharge appropriate - Penal Code, ss. 141, 143 - Criminal Procedure Code, s. 158*

D ***CRIMINAL PROCEDURE:*** *Charge - Framing or particulars of - Charge did not indicate five persons or more for the offence of unlawful assembly - Whether charge defective - Penal Code, ss. 141, 143 - Criminal Procedure Code, s. 158*

E The respondents herein were charged in the sessions court after a street protest organised by certain political parties. They were charged under two separate cases for two offences under s. 143 and s. 188 of the Penal Code. The defence counsel for the second respondent raised a preliminary objection that the charge under
F s. 143 was groundless for failure to comply with the definition of "unlawful assembly" under s. 141 of the Penal Code. According to counsel, there should be five persons or more for a valid charge under s. 143 based on the opening words of s. 141 of the Penal Code that defined an "unlawful assembly" as an assembly of five
G persons or more. In the said two cases, it was contended that there were only two and four accused respectively. The sessions court judge agreed with the contention of counsel and discharged all the respondents on a discharge not amounting to acquittal on the ground that the said charges were groundless as less than five
H persons were charged in each case, thus leaving only the second charge under s. 188 whereby a bail of RM500 was granted. The prosecution now applied for revision against the decision of the sessions court judge.

I

Held (re-instating charge against all the respondents):

(1) A charge is good in law once it conveys to an accused clearly and sufficiently the offence of which the accused is brought to court. Any defect in the framing of the charge is not incurable so as to nullify the whole proceedings or to render it groundless so long as the court is satisfied that the accused knows exactly what the offence is and that he will not be prejudiced to the extent of a grave miscarriage of justice caused against him. In the present case, it was not necessary for a charge under s. 143 of the Penal Code to state five or more persons or to state the presence of persons unknown or unidentified to make up the minimum requirement of five persons including the accused. The said charges clearly stated that the respondents were members of an unlawful assembly which was defined by s. 141 of the Penal Code. (paras 8 & 9)

(2) It was for the prosecution to prove during the trial that five or more persons were involved (*Mohan Singh & Anor v. State of Punjab; Krishnan Marimuthu & Anor v. PP*). (para 10)

(3) As for the time frame stated in the charge, it was normal for a charge to consist of a time frame within which the offence allegedly took place. There was nothing prejudicial about it as it could be understood by the accused that it could be within that time frame that all the accused were allegedly present or seen to be moving about the place where the offence allegedly took place. Similarly, as regards to the place where the offence allegedly took place, it was for the prosecution to prove as stated in the charge. That apart, under s. 51A of the Criminal Procedure Code, all accused have a right to have a copy of any pictures or documents that the prosecution is going to use to prove a *prima facie* case against them as far as the alleged time frame and place as stated in the charge is concerned. In the present case, the assembly could have been held in a time period as stated in the charge and it would be sufficient for the prosecution to prove that all the respondents were present as members of the assembly at any such time as indicated in the charge. Furthermore, the prosecution was entitled to amend the charge at any time before closing its case, and likewise the court before pronouncing judgment as provided under s. 158(1) of the Criminal Procedure Code. (para 11)

[Respondents required to appear before the same sessions court judge at such time convenient by the court or the prosecution and to be dealt with as if the said charges were at all times valid.]

Case(s) referred to:
Kamaruddin Mat Diri v. PP [2005] 3 CLJ 180 CA ***(refd)***
Krishnan Marimuthu & Anor v. PP [1982] CLJ 186; [1982] CLJ (Rep) 152 FC ***(refd)***
Lee Teng Tai v. PP [1952] 1 LNS 50 ***(refd)***
Mahomed Humayoon Shah v. Regina 21 WR Cr 72 ***(refd)***
Mohan Singh & Anor v. State of Punjab AIR [1963] SC 174 ***(refd)***
Periasamy Karuppiah & Anor v. PP [1993] 3 CLJ 46 HC ***(refd)***
PP v. Miswadi Radol & Ors [1996] 3 CLJ 763 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 51A, 154, 156, 158(1), (2), 422
Emergency Regulations 1948, reg. 4(1)(b)
Penal Code, ss. 141, 142, 143, 148, 188, 302, 375

For the prosecution - Ahmad Akram Gharib DPP
For the respondents - Nasar Khan Mirbas Khan; M/s Mazwan & Nasar

Reported by Usha Thiagarajah

JUDGMENT

Azman Abdullah JC:

[1] This is an application for revision by the prosecution against the decision of the learned sessions court judge in upholding the preliminary objection raised by the defence counsel that the charge under s. 143 of the Penal Code was groundless and ordering all the respondents to be discharged not amounting to an acquittal (DNAA).

[2] The brief facts are as follows. On 13 October 2008, in the aftermath of a street protest known as "Gabungan Protes" organized by certain political parties on 26 January 2008, the six respondents were charged in two separate cases *vide* cases no. 5-62-532-2008 and 5-62-533-2008 before the same session court judge with two offences under ss. 143 and 188 of the Penal Code respectively. On the same day, after the charge were read to all the respondents and upon hearing the preliminary objection raised by the defence counsel for the second accused in case no. 5-62-532-2008 (second respondent in this case), Mr. Gobind Singh Deo, that the first charge under s. 143 was groundless for failure to comply with the definition of 'unlawful assembly' under s. 141 of the Penal Code (a course which

was also adopted by the other counsel representing the other accused in the two cases), the learned sessions court judge, after hearing the brief arguments from Mr. Gobind and the learned Deputy Public Prosecutor on that point, made an order for all the respondents to be discharged not amounting to an acquittal (DNAA) from the said charge, apparently on the ground that the said charges were groundless as less than five persons were charged in each case, thus leaving only the second charge under s. 188 whereby a bail of RM500 was granted.

[3] The main thrust of Mr. Gobind's argument that won him the day in the court below is based on the opening parts of s. 141 of the Penal Code that defined an 'unlawful assembly' as "An assembly of five persons or more is designated an unlawful assembly ..." Apparently, it was his contention that to constitute a valid charge for an offence of unlawful assembly under s. 143 of the Penal Code, there must be five persons or more charged together or if less than five persons were charged, the charge must somehow indicate the presence of any other persons in making up the minimum requirement of five persons, whereas in the matter before the court below, as far as case no. 5-62-532-2008 is concerned, there are only two accused and there was no indication that any other persons were involved. Similarly for case no. 5-62-533-2008, the number of the accused is four. Apparently, the learned session court judge agreed with the contention as the notes of the proceeding show that it was on this ground that the order for the DNAA was made.

[4] The relevant charges in the court below read as follows:

(a) Case no. 5-62-532-2008:

PP

v.

Mohd Hatta bin Md. Ramli & Anor.

Pertuduhan pertama

Bahawa kamu bersama-sama pada 26 Januari 2008 diantara jam lebih kurang 2.45 petang dan 4.30 petang dihadapan Kuala Lumpur City Centre, Jalan Ampang, didalam daerah Dang Wangi, di dalam Wilayah Persekutuan Kuala Lumpur, adalah ahli perhimpunan yang menyalahi undang-undang, yang mana tujuan perhimpunan itu ialah

A melakukan mudarat awam (public nuisance) dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 143 Kanun Keseksaan.

(b) Case no. 5-62-533-2008:

B PP

v.

Tan Chee Hoi & 3 Ors.

C **Pertuduhan pertama**

Bahawa kamu bersama-sama pada 26 Januari 2008 di antara jam lebih kurang 2.45 petang dan 4.25 petang di Avenue K, Jalan Ampang, didalam daerah Dang Wangi, di dalam Wilayah Persekutuan Kuala Lumpur, adalah ahli perhimpunan yang
D menyalahi undang-undang, yang mana tujuan perhimpunan itu ialah melakukan mudarat awam (public nuisance) dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 143 Kanun Keseksaan.

E **[5]** Before this court, the learned DPP submitted that the charge was not groundless and the order made by the learned sessions court judge was wrong. He admitted the fact that the charge did not indicate the presence of others in the assembly other than the two and four accused respectively, but posed a question whether that
F was necessary. This is what he said in the written submission: "It is true that the charge did not state anywhere how many were actually there during the assemblies. But the question to be answered now is that whether it was necessary to spell out in the charge that there were actually more than five persons who
G participated in the assemblies?" Apparently, his answer to the question is NO. In support, he referred to the judgement of Jackson J in the case of *Mahomed Humayoon Shah v. Regina* 21 WR Cr 72 which was referred to in the case of *PP v. Miswadi Radol & Ors.* [1996] 3 CLJ 763:

H The charge I take to be first, a notice to the prisoner of the matter whereof he is accused, and it must convey to him with sufficient clearness and certainty that which the prosecution intends to prove against him and of which he will have to clear himself; second, it is an information to the Court which is to try the accused, of the
I matters to which evidence is to be directed.

He also referred to Chapter XVIII of the Criminal Procedure Code that governs the framing of charge, in particular ss. 154 and 156, and submitted that a plain reading of the words of the charge alone will give full and sufficient notice to the respondents on what they were being charged with. He argues that as the charge clearly states the following words: "Bahawa kamu ... adalah ahli perhimpunan yang menyalahi undang-undang ... dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum dibawah s. 143 Kanun Keseksaan"; the respondents were clearly being told that they were being charged for being a member of an unlawful assembly, an offence punishable under s. 143 of the Penal Code.

The learned DPP also relied on the authority of *Krishnan Marimuthu & Anor. v. PP* [1982] CLJ 186; [1982] CLJ (Rep) 152, where Salleh Abbas FJ held:

> The first point relates to the charge, which according to him is defective. The second appellant was charged as an accomplice under s. 3A of the Firearms (Increased Penalties) Act No. 37 of 1971. Under this section an accomplice who is liable for the offence is one who was not only present, but was also "reasonably presumed to have known that the principal offender was carrying or had in his possession or under his custody or control a firearm". The charge against the second appellant did not state that he "may reasonably be presumed to have known" that the first appellant had a pistol. Counsel therefore submitted that this omission rendered the charge defective. One of the rules relating to the framing of charges is that where the law does not give any specific name to the offence with which an accused person is charged, it will be sufficient for the prosecution to state in the charge so much of the definition of the offence as will give notice to the accused of the matter with which he is charged (s. 152(3) of the Criminal Procedure Code). It is not mandatory that a complete definition should be given in the charge. Looking at the charge we are not prepared to hold that the omission to make any reference to his knowledge that the first appellant had a pistol renders it defective. All that had to be stated in order to give notice to the second appellant so as to enable him to answer the charge was given. Moreover it was not shown that he was in any way prejudiced or misled by the omission. Knowledge is a matter of inference and unless it is clear that the law requires knowledge to be stated in the charge, its omission in our view does not render the charge defective. Of course it is preferable if such reference is made.

[6] Mr. Nasar Khan, counsel for the first, fifth and sixth respondents argued that without stating the presence of at least five persons, the charges are fundamentally flawed and cannot be sustained as they fail to disclose the commission of any offence. He also submitted that a failure to state in the charge the other persons involved in the purported unlawful assembly is prejudicial to the respondents for not knowing who or how many other persons are being alleged to be involved, obviously by relying on the excerpts from the case of *Mohan Singh & Anor. v. State of Punjab* AIR [1963] SC 174, a case which was also referred to by the learned DPP, which states:

> The failure to refer in the charge to other members of the unlawful assembly un-named and unidentified may conceivably raise the point as to whether prejudice would be caused to the persons before the court by reason of the fact that the charge did not indicate that un-named persons also were members of the unlawful assembly.

[7] Mr. Haijan Omar, who appeared in place of Mr. Gobind as a counsel for the second respondent, argued that the order of the learned Session court judge was correct as the charge was defective for its failure to particularize the presence of other persons involved in the alleged unlawful assembly that the respondents were accused to be a member of, thus the charge did not meet the definition of unlawful assembly under s. 141 of the Penal Code that defines an unlawful assembly as comprising five or more persons. In support, he referred to the case of *Periasamy Karuppiah & Anor v. PP* [1993] 2 MLJ 551. In that case, the appellants were charged and convicted in the magistrate's court for an offence of rioting with a deadly weapon punishable under s. 148 of the Penal Code. In allowing the appeal, the court held, *inter alia*:

(i) The charge as framed was defective as disclosing no offence in law since s. 148 of the Code does not deal with the use of a deadly weapon in a riot which is likely to cause death. The said section makes no reference to the use of a deadly weapon nor does it provide that the weapon must be such that if used it is likely to cause death.

(ii) Considering the totality of the evidence, and especially the unsatisfactory nature of the complainant's evidence, the defect in the charge cannot be cured by substituting the offence specified in the original charge for another nor by applying

s. 422 of the Criminal Procedure Code. In the circumstances, a grave miscarriage of justice had been occasioned against the three accused persons. The convictions of the appellants were therefore quashed and set aside.

[8] Having considered all the arguments, it is my view that a charge is good in law once it conveys to an accused person clearly and sufficiently the offence of which the accused is brought to court, and any defect in the framing of the charge is not incurable so as to nullify the whole proceeding or to render it groundless so long as the court is satisfied that the accused knows exactly what the offence he was charged against with and would not be prejudiced by reason of that defect in such a way as to lead to a grave miscarriage of justice against him. (Provision under ss. 158 and 422 Criminal Procedure Code will be discussed further in *Kamaruddin Mat Diri v. PP* case below).

[9] It is my finding that the said charges are good in law and the learned session court judge had erred in law and in facts when he decided that the said charges were groundless. It is my view that it is unnecessary for a charge under s. 143 of the Penal Code to consists of five or more persons or to state the presence of other person unknown or unidentified to make up the minimum requirement of five persons including the accused. The said charges clearly stated that the accused/respondents were members of an unlawful assembly, which s. 141 of the Penal Code defines as follows:

141. Unlawful assembly.

An assembly of five or more persons is designated an unlawful assembly, if the common object of the persons composing that assembly is:

First ...

...

Explanation – An assembly which was not unlawful when it assembled may subsequently become an unlawful assembly. (emphasis added)

Further, s. 142 of the Penal Code defines the terms 'being a member of an unlawful assembly' as follows:

142. Being a member of an unlawful assembly.

Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly.

By analogy, in a rape case, penetration is one of the ingredients for an offence of rape but it is sufficient to state in the charge that the accused had committed rape without alluding to the act of penetration in a sexual intercourse though it constitute one of the element of rape. For the purpose of comparison, s. 375 of the Penal Code defines an offence of rape as follows:

375. Rape.

A man is said to commit rape who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the following descriptions:

(a) ...

...

Explanation – Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Thus, under s. 375 of the Penal Code, penetration is an act necessary to constitute the sexual intercourse which is an ingredient for an offence of rape, but a charge for an offence of rape does not become groundless simply by a reason that it does not state the act of having sexual intercourse or a penetration. On the same premise, a charge for unlawful assembly could not be said as groundless simply by a reason that it does not state the existence of five persons or more.

[10] It is a matter for the prosecution to prove during the trial that five or more persons including the accused were involved in the alleged assembly so as to make it 'unlawful' as defined under s. 141 of the Penal Code which is punishable under s. 143 of the Code, and I think this is what had been decided in *Mohan Singh & Anor. v State of Punjab and Krishnan Marimuthu & Anor. v. PP (supra)*. On this point, I agreed with the contention of the learned DPP that in *Mohan Singh*'s case ie, at p. 178, the last line; it is for the prosecution to prove during the trial that five or more persons were involved.

[11] As regards to the second issue raised in the submission ie, the time frame as stated in the said charges, it is perfectly normal for a charge to consist of time frame within which the offence allegedly took place. There is nothing prejudicial about that as it could be understood by the accused that it could be within that time frame that all the accused/respondents were allegedly present or seen to be moving about the place where the alleged unlawful assembly took place. Similarly, as regards to the place where the offence allegedly took place, it is for the prosecution to prove, be it at the KLCC or Avenue K as stated in the charge. What more, under s. 51A of the Criminal Procedure Code, the accused have a right to have a copy of any pictures or documents that the prosecution is going to use to prove a *prima facie* case against them as far as the alleged time frame and place as stated in the said charge is concerned. In a murder case under s. 302 Penal Code, the time frame in which the murder is alleged to have been committed are sometimes even longer. When a decomposed body was found in such that a time of death could not be ascertained, in such a situation the burden is on the prosecution to prove that it occurred within such time frame as stated in the charge.

[12] In one extreme case of *Lee Teng Tai v. PP* [1952] 1 LNS 50, where the accused person were convicted for an offence under reg. 4(1)(b) of the Emergency Regulations 1948, the majority decision in Court of Appeal held that although the charge contains over a long period of time and particulars of five places the appellant had been continuously in possession of ammunition, to wit a hand grenade, yet the charge is quite obviously one of continuous possession and so long as possession continues the offence continues.

The charge in that case reads:

> That you, between the 15th day of July, 1948, and the 30th day of September, 1951, at Kepayang, Gunong Repat, Tikus and Juang, Kramat Pulai, in the district of Kinta, in the State of Perak, did have in your possession ammunition, to wit a hand grenade, without lawful authority therefore, and that you did commit an offence punishable under regulation 4(1)(b) of the Emergency Regulations, 1948.

Mathew CJ, delivering the majority judgment held:

> The possibility that the appellant may have changed one hand grenade for another during the period does not seem to me to be material. So long as the appellant continued to be in possession of ammunition to wit a hand grenade the offence was continuing. It is

clear from the learned trial judge's summing up that the assessors were left in no doubt as to there being one offence only and not five. He said:

> The charge regarding the dates is that she was in possession of a hand grenade between the 15th day of July 1948 and the 30th day of September 1951 ... Thus the charge is quite obviously one of continuous possession. The prosecution says that during that period she was seen carrying a hand grenade. What the prosecution did was to call a large number of witnesses who, if believed, saw her on various dates and who deposed that when they saw her she had a hand grenade, and from that the prosecution asks you to infer that any person, who could be seen in so many different parts of the State always carrying a hand grenade, must have had one somewhere she could get at it any time she wanted or, alternatively, there was one in the store somewhere she could call for it if she so desired.

There is in my view no irregularity or illegality in the charge which alleges one continuing offence and not a series of distinct and separate offences.

[13] Similarly in this case, the assembly could have been held in a time period as stated in the charge and it would be sufficient for the prosecution to prove that all the respondents were present as members of the assembly at any such time as indicated in the charge.

[14] Furthermore, the prosecution is entitled to amend the charge at any time before a close of its case, and likewise the court before pronouncing a judgment as provided under s. 158(1) Criminal Procedure Code:

> **158. Court may alter or add to charge.**
>
> (1) Any Court may alter or add to any charge at any time before judgment is pronounced.
>
> (2) Every such alteration or addition shall be read and explained to the accused.

[15] In *Kamaruddin Mat Diri v. PP* [2005] 3 CLJ 180, the appellant was originally charged for raping his stepdaughter on 4 December 1994 between 12.30am and 2am at the house they were living in, when the victim was aged only 12 years three months. The victim gave birth to a baby boy on 19 June 1995. She maintained that the

appellant had raped her many times, the last being on 4 December 1994. At the close of the case for the prosecution, the court amended the charge to read that the rape took place at the beginning of September 1994 in view of the baby boy's birth date. The defence was a total denial. He was found guilty and convicted by the Sessions Court for the offence charged and sentenced to 18 years' imprisonment with no whipping in view of his age. His appeal to the High Court and Court of Appeal were dismissed. Abdul Malek Ahmad PCA held that *inter alia* the provision of s. 158(2) of the Criminal Procedure Code only lay down a rule of procedure and not relate to the mode of the trial and by even greater force of logic *(fortiori)* in the light of the provision of s. 422 of the Code and the nature of the amendment being purely technical, which has not been rendered as a serious irregularity to vitiate the proceeding or occasion a failure of justice.

[16] On the above premise, I hereby re-instate the charge against all the respondents from which they have been ordered to be discharged not amounting to an acquittal by the learned sessions court judge, without a need for re-charging by the prosecution. All the respondents are required to appear before the same session court judge at such time as found to be convenient by the court or the prosecution and to be dealt with as if the said charges were at all times stand valid.